CTI GROUP INC

v.

INTERNATIONAL BULK CARRIER SPA

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RAVINTHRAN PARAMAGURU J
[CIVIL CASE NO: LBN-24-8-7-2013]
3 FEBRUARY 2014

ARBITRATION: *Agreement - Existence of - Submitting counterclaims that were not in initial terms of reference - Whether amounted to an agreement to arbitration proceedings*

ARBITRATION: *Award - Enforcement of - Whether plaintiff could enforce final award singularly when Tribunal had granted award for plaintiff and its co-claimant jointly and severally*

ARBITRATION*: Enforcement - Foreign award - Application to set aside recognition and enforcement order - Whether defective - Whether there was binding arbitration agreement between plaintiff and defendant - Whether correctly applied under s. 38 of Arbitration Act 2005 - Whether application allowed*

The plaintiff had entered into a share transfer agreement ('STA') with several other parties. The STA included a guarantee clause where the defendant would guarantee the payment of the balance purchase price for the shares to a signatory of the STA, CNAN Group SPA ('CNAN'). Consequently, the defendant signed Annex 6 and Annex 7, acknowledging its rights and obligations created by the STA. In the course of complying with the STA, a dispute arose between the parties and the plaintiff commenced an arbitration proceeding in the International Chamber of Commerce in France as a form of recourse agreed between the parties in the STA. The defendant had initially objected to the proceedings due to lack of jurisdiction but did not ask for an interim award. Nevertheless, during the proceedings, the defendant raised new counterclaims that were not in the terms of reference, and these additions were allowed by the Arbitration Tribunal ('the Tribunal'). It was noted by the Tribunal that the later part in the defendant's submissions did not raise the jurisdictional objection and that by submitting the counterclaims, the defendant had unconditionally acknowledged the Tribunal's jurisdiction. In light of this finding, the Tribunal awarded the final award in favour of the plaintiff and

co-claimant, Pharaon. The plaintiff obtained an order under s. 38 of the Arbitration Act 2005 ('the Act') for recognition and enforcement of the said final award from the High Court. The instant case was the defendant's application to set aside the recognition and enforcement of the Tribunal's order under the same section of the Act on the grounds, *inter alia* (i) that there was no binding arbitration agreement between the defendant and the plaintiff; (ii) that the counterclaims by the defendant could not be considered as an arbitration agreement; and (iii) that the plaintiff could not enforce the award for the whole sum when the final award of the Tribunal had also been awarded in favour of Pharaon as the other claimant in the proceedings.

Held (dismissing application with costs):

(1) Annex 6 and 7 referred to in the STA conferred benefit as well as imposed obligations on the defendant. The STA itself stated that the Annexes were integral to it, where it contained an agreement to arbitrate. The defendant could not have been unaware of the STA when it executed the Annexes. Thus, the arbitration agreement in the STA was binding on the defendant. The non-production of the Annexes before the court was irrelevant as the arbitration agreement was found in the STA. (para 14)

(2) The STA created rights and obligations on the defendant; binding it to the arbitration agreement. Although the burden to challenge the finding of fact by the Tribunal was with the defendant, the defendant had not produced any materials to show that the Tribunal had misconstrued French law in coming to the finding. Further, in light of the finding that the arbitration agreement in the STA was binding, the failure by the plaintiff to produce the counterclaim and defence together with the arbitration agreement when applying to register the final award under s. 38 of the Act was not fatal. (paras 16 & 18)

(3) The application for the recognition and enforcement order by the plaintiff was not defective merely because Pharaon was not joined as a co-plaintiff. Even though the plaintiff and Pharaon had each bought 24.5% of the shares in the defendant, the Tribunal stated that they had acted "jointly and severally" in the final award that was granted in their favour. (para 19)

(4) The scheme of the Act provides that a recognition and enforcement order that has been obtained under s. 38 of the Act can only be set aside or refused under s. 39 of the Act as s. 38 does not contain any provision for the setting aside of an order granted under it. Once the court satisfies itself that the arbitration award and arbitration agreement has been produced and grants the recognition and enforcement order, it is for the defendant to 'request' the court under s. 39 to refuse recognition. In this case, the defendant did not bring the application under s. 39, to which the application must be dismissed for non-compliance. (para 21)

Case(s) referred to:

Ajwa for Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd [2013] 7 CLJ 18 FC ***(refd)***

Aughton Ltd v. MF Kent Services Ltd [1991] 57 BLR 1 ***(refd)***

Star-Trans Far East Pte Ltd v. Norske-Tech Ltd & Ors [1996] 2 SLR 409 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 9(4)(c), 38(1), (2), 39(1), (5)

For the plaintiff - Oommen Koshy (Nur Arineh Sabtu with him); M/s Skrine
For the defendant - Arunachalam Kasi; M/s Esther Ong, Tengku Saiful & Sree

Reported by Lyana Shohaimay

JUDGMENT

Ravinthran Paramaguru J:

Introduction

[1] The plaintiff had obtained a final award in its favour from the International Court of Arbitration in Paris under the Rules of the International Chamber of Commerce ('ICC'). The final award was handed on 16 April 2013. On 16 July 2013, the plaintiff obtained an order under s. 38 of the Arbitration Act 2005 for recognition and enforcement of the said final award from this court. Now, the instant application is an application by the defendant to set aside the said recognition and enforcement order. In the notice of application, the defendant has cited s. 38 of the Arbitration Act 2005.

A **Brief Facts**

[2] The dispute between the parties originated from an agreement known as the share transfer agreement ('STA') which was executed between the plaintiff and several parties. It contains
B an arbitration clause. The defendant herein is not one of the parties to the STA. The parties who executed the STA are CNAN Group SPA ('CNAN'), Pharaon Commercial Investment Group Limited (Pharaon), Mr Mustapha Abdelwahab Laradji ('Laradji') and CTI Group Inc ('the plaintiff'). The backdrop to
C the STA is as follows. CNAN are ship owners. Some of their ships were owned through International Bulk Carrier SPA ('the defendant'). Pharaon is involved in sea transportation business. The plaintiff is also a ship owning company. Mr Laradji is an Algerian businessman. Under the terms of the STA executed on
D 27 September 2007, CNAN sold 51% of its shares in the defendant to Pharaon, Laradji and the plaintiff in the proportion of 24.5%, 24.5% and 2% respectively. The defendant was a wholly owned subsidiary of CNAN at the time. The total price of the shares was USD9,282,000. The purchasers paid
E USD6,832,000 upon signing of the STA. The balance of USD2,450,000 was to be paid in five instalments over a five-year period. The plaintiff, Pharaon and Laradji also agreed to grant a loan of USD5 million to the defendant. A clause in the STA stated that the defendant would guarantee the payment of the
F balance of the purchase price of USD2,450,000 to CNAN by the plaintiff, Pharaon and Laradji. In the same guarantee clause, it was stated that the plaintiff, Pharaon and Laradji would assign a part of the debt-claim to CNAN which is limited to the sum of USD2,450,000 which is the balance of the purchase price. This
G guarantee and assignment is referred to in Annex 6 to the STA which was signed by the defendant. It is also stated in the guarantee clause that the defendant would deposit the said guaranteed sum of USD2,450,000 into a bank account and pledge the same as security in favour of CNAN. This pledge is referred
H to in Annex 7 to the STA which was also signed by the defendant. Thus in Annex 6 and 7, the defendant acknowledged its rights and obligations that were created by the STA. It must also be noted that Annex 6 and 7 were signed by the defendant on the same date as the STA.

I

[3] Pursuant to the sale of the said shares, the defendant's vessels were chartered to the plaintiff under the terms and conditions of the STA. The STA states that the "Appendices" shall bind the parties in the same manner as the STA and shall constitute "an integral part" thereof. The STA contained an arbitration clause to refer dispute between the parties in the event of dispute to the International Chamber of Commerce. A dispute arose between the parties in respect of the initial loan of USD5 million granted by Pharaon and the plaintiff to the defendant and reimbursement costs of repairs to three vessels. The principal sum claimed as reimbursement by Pharaon and the plaintiff was USD11,522,546.18. In accordance with cl. 11.4 of the STA, the plaintiff and Pharaon commenced arbitration proceedings in France against CNAN, the defendant and Laradji. The arbitration proceedings lasted two years. The defendant initially objected to the proceedings on the ground of lack of jurisdiction. However, the defendant did not ask for an interim award. Nonetheless, the defendant raised new counterclaims against the plaintiff which were outside the terms of reference. The Arbitration Tribunal allowed the addition of new counterclaims. The Arbitration Tribunal overruled the objection on lack of jurisdiction. The Arbitration Tribunal noted that the defendant did not raise the jurisdictional objection in later submissions and by submitting counterclaims, it had unconditionally recognised the jurisdiction of the Arbitration Tribunal. The Arbitration Tribunal also considered Annex 6 and 7 which created rights and obligations in respect of the defendant.

Application To Set Aside

[4] The grounds of the defendant to set aside recognition and enforcement order dated 16 July 2013 are as follows:

(a) That there was no binding arbitration between the plaintiff and the defendant;

(b) That the counterclaim by the defendant cannot be considered as an arbitration agreement;

(c) That the plaintiff who is one of two claimants in the arbitration proceedings cannot enforce the award for the whole sum since the final award was in favour of both.

Decision

[5] The recognition and enforcement order in question was obtained by the plaintiff under s. 38 of the Arbitration Act 2005. Sub-sections (1) and (2) of s. 38 read as follows:

> (a) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and s. 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.
>
> (c) In an application under subsection (1) the applicant shall produce:
>
> (i) the duly authenticated original award or a duly certified copy of the award;
>
> (ii) the original arbitration agreement or a duly certified copy of the agreement.

[6] Counsel for the plaintiff submitted that the scheme of the Arbitration Act 2005 provides that an application to set aside a recognition and enforcement order under s. 38 should be grounded under s. 39(1) which reads as follows:

> (1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked:
>
> (a) where that party provides to the High Court proof that:
>
> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

[7] Counsel for the plaintiff then proceeded to submit that the instant application does not come within any of the grounds stipulated in s. 39. Counsel for the defendant did not seriously dispute this contention but he argued strenuously that the pre-conditions for a recognition and enforcement order under s. 38 were not satisfied in the first place. He argued as follows:

> It is respectfully submitted that the challenge taken in our case is not under s. 39, but it is under s. 38. Only if and when the Plaintiff herein had satisfied s. 38(2), the burden would then shift to the Defendant herein to deal with s. 39. The Defendant herein does not go that far, but merely questions whether the Plaintiff has satisfied s. 38(2).

[8] Counsel for the defendant submitted that production of the arbitration agreement is a precondition under s. 38 for registration of the arbitration award. In the instant case, he said that the only arbitration agreement that was produced was the STA. The arbitration agreement is contained in the STA. As the defendant is a not a party to the STA, according to counsel for the defendant, it follows that no arbitration agreement was produced when the plaintiff applied for the recognition and enforcement

order. Counsel for the defendant referred to the definition of an "arbitration agreement" in s. 9 of the Arbitration Act 2005 which reads as follows:

> 9. Definition and form of arbitration agreement
>
> (1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing where it is contained in:
>
> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or
>
> (c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
>
> (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

[9] In the instant case, it is common ground that the plaintiff and the defendant had not signed the STA. The arbitration agreement is only provided in the STA. Only the final award and the STA were produced by the plaintiff before the court for the purpose of the s. 38 application. Annexes 6 and 7 were not produced. The crucial issue that arises is whether the defendant is bound by the arbitration clause contained in the STA. I shall consider the argument of the counsel for the plaintiff that the application should have been made under s. 39 at the end of this judgment.

Whether There Is Incorporation By Reference?

[10] Counsel for the defendant cited the English Court of Appeal case of *Aughton Ltd v. MF Kent Services Ltd* [1991] 57 BLR 1 and submitted that distinct and specific words were required to

incorporate an arbitration clause by reference to another document and deprive a party of the ordinary right of access to the court in exchange for a right to arbitrate. Counsel for the defendant also cited the case of *Star-Trans Far East Pte Ltd v. Norske-Tech Ltd & Ors* [1996] 2 SLR 409 where the Singapore Court of Appeal held an arbitration clause in a different contract is not to be incorporated by reference into the contract unless clear words of incorporation are used. Annex 6 and 7 which is executed by the defendant makes reference to the STA. However, Annex 6 and 7 which are essentially a contract of guarantee and a deed of pledge do not specifically provide that the parties to it are bound by the arbitration clauses contained in the STA. Counsel for the plaintiff on the other hand cited the case of *Ajwa for Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd* [2013] 7 CLJ 18; [2013] 5 MLJ 625 where our Federal Court held that specific reference to the arbitration clause in another document is not necessary. In that case, the sales contracts made a clear reference to the standard terms and conditions (STC) that contained an arbitration clause. However, there was no specific reference to the arbitration clause and the STC was not attached to the sales contracts. The Federal Court said as follows:

> We are of the view that the mere fact the arbitration clause is not referred to in the contract and that there is a mere reference to standard conditions which was neither accepted nor signed, is not sufficient to exclude the existence of the valid arbitration clause. There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required.

[11] In the instant case, the Annex 6 and 7 make clear reference to the STA which contains an arbitration clause. The STA itself contains provisions that state that the appendices (which include Annexes 6 and 7) are integral to it. Clause 1.1 defines "Appendices" as:

> the numbered documents, the copies or originals of which have been duly initialed by the Parties and annexed to this Share Sale Agreement and **which constitute integral part hereof**.
>
> (emphasis added)

[12] Clause 1.2 of the STA, in part, provides as follows:

> The Preamble and the Appendices shall bind the Parties in the same manner as this agreement, of which **they constitute an integral part** ...
>
> (emphasis added)

[13] In *Ajwa for Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd (supra)*, the Federal Court considered sub-s. (5) of s. 9 that provides that an arbitration agreement can be incorporated by reference only if:

> ... the reference is such as to make that clause part of the agreement.

[14] To recapitulate, Annex 6 and 7 referred to the STA which conferred benefit as well as imposed obligations on the defendant. The STA itself stated that the Annex 6 and 7 are integral to it. The STA contained an agreement to arbitrate. Furthermore, on the evidence, the Arbitration Tribunal noted that the defendant could not have been unaware of the STA when it executed Annex 6 and 7 which are integral parts of the STA. In the premises, I am inclined to accept the argument of counsel for the plaintiff that the arbitration agreement in the STA binds the defendant. I also find that it is irrelevant that the plaintiff did not produce Annex 6 and 7 when they applied to registered the final award under s. 38. This is because the relevant arbitration agreement is contained in the STA.

Whether Defendant A Party To The STA By Virtue Of French Law?

[15] It was not disputed that the STA created rights and obligations in respect of the defendant. The Arbitration Tribunal held that under "arbitration case law and international legal theory, as well as applicable French law" it is established that:

> "the extension of the arbitration agreement to a non-signatory is accepted if the agreement containing it creates rights and obligations with regard to the same party". ... The extension of the arbitration clause is possible insofar as IBC benefited from certain rights and assumed obligations deriving from the Transfer Agreement: loan, charter hire of ships, assumption of repair costs, etc.

[16] The Arbitration Tribunal has therefore made a finding of fact based on the law of the seat of arbitration that the defendant is bound by the arbitration clause contained in the STA. In my view, the burden to challenge this finding of fact does not lie on the plaintiff. It lies on the party that seeks to displace the finding of the Arbitration Tribunal. The defendant has not produced any material to argue that the Arbitration Tribunal has misconstrued French Law in coming to this finding of fact. In the premises, I am not minded to hold the Arbitration Tribunal was wrong in its conclusion that the defendant was bound by the arbitration agreement contained in the STA.

Whether Counterclaim By The Defendant Constitutes An Arbitration Agreement?

[17] Section 9(4)(c) provides that an arbitration agreement can be contained in:

> ... an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

[18] Counsel for the defendant conceded that by virtue of the above provision, a counterclaim pursued by a party in the arbitration proceedings can operate as an arbitration agreement. He then submitted that the counterclaim and the defence were not produced together with the arbitration agreement when the plaintiff applied to register the final award under the s. 38. Counsel for the plaintiff did not dispute the fact that the counterclaim and defence were not produced to support the s. 38 application. In the premises, I agree with counsel for the defendant that the counterclaim should have been produced. However, in view of my finding that the arbitration agreement in the STA is binding on the defendant, I hold that the failure to produce the counterclaim is not fatal.

Whether Plaintiff Can Enforce The Final Award Singularly?

[19] The final award says that CTI and Pharaon "are acting jointly and severally". Counsel for the defendant submitted that this means that "CTI/Pharaon" in the final award meant the plaintiff and Pharaon. He argued that each of the claimants, ie, the plaintiff and Pharaon have equal rights in the final award in the ratio of 50:50. Therefore, the submission of counsel for the

defendant is that if the plaintiff wished to claim the whole awarded sum, it should have joined Pharaon or otherwise, they should have limited its claim to half of the awarded sum. Counsel for the plaintiff responded that this argument was only raised in the affidavit in reply of the defendant dated 8 October 2013 which was filed out of time and therefore should not be considered. However, counsel for the plaintiff submitted that since the claimants (the plaintiff and Pharaon) acted "jointly and severally", the plaintiff has the full right to enforce the judgment either separately or jointly. In my opinion, the application for the recognition and enforcement order is not defective merely because Pharaon was not joined as a co-plaintiff. Regardless of the fact that the plaintiff and Pharaon each bought 24.5% of the shares in the defendant company, the Arbitration Tribunal stated they had acted "jointly and severally" in the final award that was granted in their favour.

Whether Execution Attempt In Greece Should Have Been Disclosed?

[20] Counsel for defendant submitted that the plaintiff failed to disclose in the affidavit in support that they had attempted to execute the final award in Greece. However, I do not think that this omission is material. It is not disputed that the plaintiff did not realise the entire judgment or part of the judgment with the resultant effect the judgment sum claimed herein should be correspondingly reduced. In the premises, I find this to be a non-issue.

Whether Application Should Have Been Made Under S. 39?

[21] I noted at the outset that the defendant did not ground this application under s. 39(1) of the Arbitration Act 2005. To my mind, counsel for the plaintiff is correct in his argument that the scheme of the Arbitration Act 2005 provides that a recognition and enforcement order that has been obtained under section 38 can only be set aside or refused under section 39. Counsel for the defendant had submitted that only if the pre-condition under s. 38(2) is satisfied, the burden to set aside the award under s. 39 shifts to the defendant. The pre-condition under s. 38(2) is the requirement to produce the duly authenticated arbitration award and the arbitration agreement. I have ruled that s. 38(2) has been complied with. However, I shall now address this issue

for sake of completeness. Section 38 does not contain any provision for the setting aside of an order granted under it. Therefore, in my respectful view, once the court satisfies itself that the arbitration award and arbitration agreement has been produced and grants the recognition and enforcement order, it is for the defendant to "request" the court under s. 39 to refuse recognition. In the instant case, the defendant did not bring the instant application within the grounds envisaged in s. 39 of the Act. In fact, counsel for the defendant pointedly submitted that this application is not made under s. 39 but under s. 38. In the premises, I am also constrained to hold that the instant application must be dismissed for not complying with s. 39.

[22] For all the above reasons, the application of the defendant to set aside the recognition and enforcement order made on 16 July 2013 is dismissed with costs of RM25,000. In the premises, I shall also dismiss the application of the defendant for interim stay of execution pending this application with costs of RM1,000.